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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-700

BERT L. PAJEWONSKY,

Petitioner,

against

RALPH M. PAJEWONSKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Bert L. Paiewonsky, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on July 21, 1971, which affirmed an order of the District Court of the Virgin Islands, Division of St. Thomas and St. John, entered August 12, 1970, dismissing the complaint herein on the ground that a married woman may not sue her husband to recover damages for wilful tort.

Citation to Opinions, Order and Judgment Below

The opinion of the District Court of the Virgin Islands, Division of St. Thomas and St. John, is officially reported at 315 F. Supp. 752. A copy of that opinion is printed as Appendix A, pages 1a-11a. A Copy of the District Court's Order is printed as Appendix B, page 12a.

The opinion of the United States Court of Appeals for the Third Circuit is officially reported at 446 F. 2d 178. A copy of that opinion is printed as Appendix C, pages 13a-19a. A Copy of the Third Circuit's Judgment of Affirmance is printed as Appendix D, page 20a.

An application for rehearing *en banc* was denied by the United States Court of Appeals for the Third Circuit by order dated and entered September 1, 1971. A copy thereof is printed as Appendix E, page 21a.

Jurisdiction

Judgment of the Court of Appeals for the Third Circuit was entered on July 21, 1971. A timely petition for rehearing *en banc* was denied on September 1, 1971, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a State may bar a woman, otherwise entitled to sue for a tort committed against her, from maintaining the suit because of the married status of the parties.

2. Whether a state's interest in promoting domestic tranquillity is a sufficiently "compelling reason" to support the discriminatory treatment of married women.

3. Whether Federal law must yield to a state's "public policy" interpretation of its legislation.

4. Whether a common law principle may be invoked to deprive petitioner of the equal rights accorded to her under a Federal statute and the Constitution.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment provides in pertinent part:

> "SECT. 1. . . . No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI of the United States Constitution provides in pertinent part:

ARTICLE VI

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

42 U.S.C. § 1981 provides:

§ 1981. EQUAL RIGHTS UNDER THE LAW

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

16 Virgin Islands Code § 71 provides:

"Contracts may be made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried."

5 Virgin Islands Code § 72 provides in pertinent part:

"A wife may . . . prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried."

Facts Giving Rise to the Action

The jurisdiction of the District Court of the Virgin Islands was invoked because it is the sole Court of jurisdiction (48 U.S.C. § 1392).

Respondent's first wife, Ethel, divorced him in 1959 after more than twenty years of marriage. Respondent, who had long aspired to the Governorship of the Virgin Islands, a position then soon to be filled by the then President-Elect John F. Kennedy, recognized and believed that the prospect of his gaining that appointment was diminished by his status as a divorced man but would be enhanced if he were married to a woman who would contribute to and aid him in establishing the image and reputation of stability and graciousness.

Respondent, after a three-week courtship, proposed marriage to petitioner in January 1960, married her soon thereafter, and was in short time nominated by President Kennedy and appointed Governor of the Virgin Islands.

In or about 1966, respondent's first wife, Ethel, who had remarried following her obtainment of a divorce from respondent, became widowed. Respondent then resumed a more open, personal relationship with her and they planned their remarriage. He did not, however, wish to initiate any steps to terminate his marriage to petitioner so long as he was Governor, because he was concerned over the impact of such action on his position, and so he said nothing to the petitioner of his plans to divorce her and remarry his former wife, Ethel. After his term of office came to an end, following President Nixon's election in November, 1968, respondent left petitioner and instituted a divorce suit against her on the ground of "temperamental incompatibility"*. Upon ascertaining all of these facts, petitioner instituted this action.

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* That divorce has since been granted.

Two causes of action are pleaded in the complaint. In the first, it is alleged that respondent defrauded petitioner into marrying him by concealing his true motivation for the marriage. In the second cause, it is alleged that respondent deceitfully perpetuated petitioner in the marriage relationship after his first wife became widowed and his decision to remarry her, only to avoid embarrassment to himself while he held high political office, and that once his term of office came to an end he promptly undertook to and did put an end to his marriage to petitioner.

Such conduct, it is pleaded, was fraudulent and wrongful, and in total disregard of petitioner's interests, health, sensibilities and dignity as a human being.

The allegations of the complaint are deemed true, respondent having moved only to dismiss the complaint on the grounds that the complaint fails to state a cause of action and that petitioner is barred from maintaining the suit because she is married to the respondent.

The Opinions Below

The District Court, upon respondent's motion, dismissed the complaint on the ground that a married woman may not sue her husband to recover damages for wilful tort* (Appendix A, pages 1a-11a).

The Court of Appeals, in affirming, decided that the denial to a married woman of the right to sue her husband for a wilful tort committed against her does not violate the Equal Protection Clause of the Fourteenth Amendment because the promotion of domestic tranquillity is "sufficiently compelling" to support such discriminatory classification against married women (Appendix C, page 19a).

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* Having so decided, it did not pass upon the alternative ground for dismissal, i.e., failure to state a cause of action (Appendix A, pages 2a-3a).

Reasons for Granting the Writ

Statement

Whether a woman, against whom is committed an intentional tort, should be barred from maintaining an action against the tort feasor only because he is her husband, is the basic question here sought to be reviewed. The reasons hereinafter advanced for the grant of the requested writ mesh. That is to say that the question of whether the archaic common law principle of interspousal immunity is to be followed, is not only ripe for re-examination in this era of realistic realization and treatment of women's rights, but conflicting judicial opinion, throughout the United States, on this important issue, makes necessary further review so that a uniform rule may be applied.

It may be noted that but two days ago this Court decided that a provision of an Idaho Statute which operated to discriminate against a woman's right to serve as a fiduciary of an estate violated the Equal Protection Clause of the Fourteenth Amendment (see *Reed* v. *Reed*, — U. S. —, decided November 22, 1971, Case No. 7040).

1. The Decision Below Should Be Reviewed Because It Is Based Upon An Archaic Common Law Principle That Is Ripe For Re-Examination.

A. The common law principle of interspousal immunity in tort is fundamentally predicated on the ancient doctrine of the legal identity of husband and wife (1 *Blackstone Commentaries* 442). Early in the 19th Century, married women's emancipation acts, designed to confer upon women a separate legal personality and to give them a separate legal estate in their own property, were passed in all American jurisdictions. These statutes conferred upon a wife the capacity to sue or be sued without joining her husband, and, generally, as far as third persons were concerned, made the wife separately responsible for her own torts.

While the legal identity of husband and wife was destroyed by such emancipatory acts, there was still a reluctance to extend such emancipation to the field of per-

sonal tort actions between husband and wife. It was thought that such actions, if permitted, would destroy the peace and harmony of the marital home and so be contrary to public policy.

Thompson v. *Thompson*, 218 U.S. 611, cited below in support of the decisions herein, was bottomed on that "public policy" and so impelled this Court, in 1910, to construe the language of the emancipatory act there involved * as not beng intended to give to a married woman a right of action in tort against her husband.

Mr. Justice Harlan's minority opinion—in which he was joined by Mr. Justices Holmes and Hughes—strongly disputed an interpretation that accorded a married woman the right to sue her husband in respect of business and property but denied her the right to sue him for a tort committed against her person. Mr. Justice Harlan wrote:

> ". . . Congress, under the construction now placed by the court on the statute, is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person. I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention of her property, and at the same time deny her the right to sue him, separately, for a tort committed against her person."

In the 60 years that have elapsed since *Thompson*, *supra*, was decided, 19 states that have dealt with the question have concluded that the principle of interspousal immunity for torts is no longer a viable principle of law

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* Code of District of Columbia, § 1155, "Power of wife to trade and to sue and be sued: Married women shall have power . . . . to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried; . . ."

and have adopted the reasoning of the minority in *Thompson, supra.*

The following is a schedule of cases evidencing the evolvement of prevailing judicial opinion by the courts throughout the United States whose judgment is final, in the absence of Supreme Court review, that the "public policy" reasons for invoking interspousal immunity, namely, to preserve conjugal harmony and to prevent collusive suits, lack sufficient force to justify depriving a married woman of the right to sue her husband for a tort committed against her person.

Case	Jurisdiction	Year
Brown v. Brown, 89 Atl. 889	Connecticut	1914
Fiedler v. Fiedler, 140 Pac. 1022	Oklahoma	1914
Gillman v. Gillman, 95 Atl. 657	New Hampshire	1915
Johnson v. Johnson, 77 SO. 335	Alabama	1917
Crowell v. Crowell, 105 S.E. 206	North Carolina	1920
Prosser v. Prosser, 102 S.E. 787	South Carolina	1920
Wait v. Pierce, 209 N.W. 475	Wisconsin	1926
Katzenberg v. Katzenberg, 37 S.W. 2d 696	Arkansas	1931
Fitzmaurice v. Fitzmaurice, 242 N.W. 526	North Dakota	1932
Rains v. Rains, 46 P. 2d 740	Colorado	1935
Scotvold v. Scotvold, 298 N.W. 266	South Dakota	1941

Lorang v. Hays, 209 P. 2d 733	Idaho	1949
Damm v. Elyria Lodge No. 465, 107 N.E. 2d 337	Ohio	1952
Brown v. Gosser, 262 S.W. 2d 480	Kentucky	1953
Koplik v. C. P. Trucking Corp., 135 A. 2d 555	New Jersey	1957
Ennis v. Truhitte, 306 S.W. 2d 549	Missouri	1957
Kowaleski v. Kowaleski, 361 P. 2d 64	Oregon	1961
Self v. Self, 376 P. 2d 65	California	1962
Cramer v. Cramer, 379 P. 2d 95	Alaska	1963

It may be noted that the language of the emancipatory acts involved in the decisions listed above is similar to, if not more restrictive than, the language employed in the District of Columbia statute involved in *Thompson, supra,* and the Virgin Islands statutes involved in this suit.

The Connecticut statute, Public Acts, Ch. 114, provides: "A wife shall have power to make contracts with third persons".

The Oklahoma statute, § 3363, of the 1910 Revised Laws, provides that: ". . . and for any injuries sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone."

The New Hampsire statute, Public Statute, § 2C176, provides that: "A married woman may sue and be sued in

all matters of law and equity and upon any contract by her made, or for any wrong by her done, as if she were unmarried."

The Alabama statute, § 4492, provides that: "A wife shall have full legal capacity to contract as if she were sole, except as otherwise provided by law."

The North Carolina and South Carolina statutes, Ch. 13 § 1 and § 3761 of the Code of Laws, provide, respectively, that:

> "The earnings of a married woman by virtue of any contract for her personal services and any damages for personal injuries or other torts sustained by her, can be recovered by her suing alone and such earnings or recovery shall be her sole and separate property as if she had remained unmarried."

and

> "A wife may enforce a contract made with her."

The Wisconsin statute, Revised Statutes, § 246.07 provides that: "Any married woman may bring and maintain an action in her own name for any injury to her person or character, the same as if she were sole."

The Arkansas statute, Act 159 of the General Assembly, provides: "Every married woman and every woman who may in the future become married shall have all rights to contract and be contracted with, to sue and be sued and in law and in equity shall enjoy all rights and be subjected to all the laws of this state, as though she were femme sole."

The North Dakota statute, § 4411, provides that: "The wife after marriage has with respect to property, contracts and torts, the same capacity and rights and is subject to the same liabilities as before the marriage."

The Colorado statute, § 5577 Compiled Laws, provides that: "Any woman may, while married, sue and be sued,

in all matters having relation to her property, person or reputation, in the same manner as if she were sole."

The South Dakota statute, SDC 1402.02, provides that:

> ". . . and for any injury to her reputation, person or property she may sue in her own name without joining her husband as party plaintiff and in like manner actions founded upon her separate contracts or torts or relating to her individual property may be brought against her without joining her husband as party defendant."

The Idaho statute, § 5-305, provides that: "A woman may while married sue and be sued in the same manner as if she were single."

The Ohio statute, § 11245 of the Statutes of the General Assembly, provides that: "A married woman shall sue and be sued as if she were unmarried, and her husband joined with her only when the cause of action is in favor of or against both."

The Kentucky statute, Civ. Code Prac. § 34, KRS 404.020, provides that: "A married woman may sue or be sued as a single woman."

The Oregon statute, Laws of 1878 § 2, OCLA § 63-209, provides that each spouse: "could sue each other to recover his or her separate property as if they were unmarried."

The California statute, §§ 171A and 370 of the Civil Code, provides that:

> "A married woman may be sued without her husband being joined as a party and may sue without her husband being joined as a party in all actions, including those of injury to her person, libel, slander, false imprisonment, or malicious prosecution, or for the recovery of her earnings or concerning her right or claim to the homestead property."

The Alaska statute is identical in language to the Virgin Islands statute, 16 V.I.C. § 71:

> "Contracts made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried."

It is evident from the foregoing that the archaic common law principle of interspousal immunity, perpetuated in *Thompson, supra*, decided sixty-one years ago by a 6-3 vote, has not only been a source of controversy but that the uninterrupted trend throughout the United States has been to judicially expand upon even the most limitedly worded married women's acts so as to emancipate married women from a principle that is totally unsuited to modern jurisprudence. Since the language of the Virgin Islands statute is identical to that employed in the Alaska Statute and is far broader than the language employed in the statutes of the other states listed above, it appears that the construction of the Virgin Islands statute by the Courts below is incompatible with the purposes of married women's acts.

This Court, it is respectfully submitted, should not let stand a construction which is permeated with a philosophy that is hostile to a considerable segment of our population, and operates to violate the Equal Protection Clause of the Fourteenth Amendment.

B. Indeed, the District Court, though concluding that interspousal immunity has "continuing vitality" based upon the public policy reason advanced in *Thompson, supra*, acknowledged that contrary opinion is "expressed" in other jurisdictions (Appendix C page 18a).

Such contrary opinion, in fact is to be found not only in the decisions listed above but is forcefully expressed by leading authorities.

> "But a strong and probably increasing minority view permits the wife to sue her husband for such

harms, especially if they are intended wrongs. A few liberal decisions have permitted the action for the husband's negligence. This result seems eminently desirable. The metaphysical and practical reasons which prevented such actions at common law are no longer applicable. The danger to the family peace and tranquillity here, as in the case of suits by an infant against his parent, has been grossly over-emphasized. Sound policy and ordinary fairness commend the right of the wife to recover for tortious invasions of her interests in personality by her husband."

Harper & James "Torts", pp. 643-6 (1946).

And it is stated in Prosser, *Law of Torts*, 3rd Ed., 882-5 (1965):

"The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property, or brings a criminal prosecution against him . . .

. . . In some sixteen states one or more 'exceptions' have been recognized to the general rule of complete immunity between husband and wife, where for one reason or another the considerations of policy supposed to underlie it have been held not to apply.

* * *

. . . some nineteen jurisdictions, with the unanimous approval of legal writers, have followed the lead of a noted dissenting opinion of Mr. Justice Harlan, have rejected all arguments in justification of the immunity as specious. . . ."

See also:

Albertsworth, "*Recommendation of New Interests in the Law of Torts*", 10 Cal. L. Rev. 461 (1922).

McCurdy, "*Torts Between Persons In Domestic Relations*", 43 Harv. L. Rev. 1030 (1930).

Farage, "*Recovery For Torts Between Spouses*", 10 Ind. L. J. 290 (1935).

In summary, then, the conflict here presented involves an important question of the applicability of the common law, interwoven with an important question of statutory construction which, particularly because of the importance of the question of equal rights begs for a uniform rule.

2. The Decision Below Should Be Reviewed Because It Allows A State, Under Guise of Public Policy Considerations, to Disregard the Supremacy of a Federal Law.

Apart from the conflict that exists among the states as to the validity of the "public policy" reasons underlying the application of the interspousal immunity principle, and which should be resolved by this Court, a substantial question of Federal law is posed by the decision below.

Article VI of the Constitution of the United States which provides for the supremacy of Federal laws mandates that state courts be bound by the provisions of 42 U.S.C. § 1981.

§ 1981 accords to "all persons within the jurisdiction of the United States" the right "to sue" and "the full and equal benefit of all laws and proceedings for the security of persons".

The determination below, in effect, permits a state to avoid the supremacy of a Federal law by bottoming the denial of the "right to sue" on the state's public policy interest in preserving domestic tranquillity.

Hence, the substantial question posed for review is whether a state may, through the expedient of a self-proclaimed state interest, disregard contrary Federal law and establish different classes of persons on the basis of criteria wholly unrelated to the objective.

3. The Decision Below Should Be Reviewed Because It Is In Conflict With Decisions Throughout the United States Whose Judgment Is Final In The Absence of Supreme Court Review.

As stated above, nineteen states which have dealt with the question have concluded that interspousal immunity for torts is no longer a viable principle of law. The judgments of those Courts, final in the absence of Supreme Court review, stand in marked conflict with the decision below.

This conflict reflects differences as to the general principles that should govern the exercise of a protected right to sue, if not a direct and real conflict in the application of rules of law.

The Court of Appeals refused to follow *Cramer* v. *Cramer*, 379 p. 2d 95 (Alaska, 1963)—although the Alaska statute is identical to the Virgin Islands statute—on the reasoning that *Cramer* had not yet been decided when the Virgin Islands adopted its identical statute. Hence, the Court stated, it was bound by the 1906 decision in *Decker* v. *Kedley*, 148 Fed. 681, since it then was the last pronouncement by a Court having jurisdiction over the Territory of Alaska. (Appendix C, pages 17a-18a).

This reasoning, resting on a "rule of construction", underscores the need for Supreme Court review. For that "rule of construction", so applied, would require the courts of the remaining states which have not yet dealt with the question, to look to the legislatures of their own states for enactment of new statutes which would "express in terms of irresistible clearness" (*Thompson, supra*) an intent to abrogate the common law principle of interspousal immunity.

Recognizing, as we must, the improbability of such unanimous, precise and identical legislative action and enactments throughout the United States, there will flourish, in the absence of this Court's pronouncement, conflicting determinations of a married woman's rights under the "common law". So important a question should not be left to varying interpretations in differing states. Since the Courts have had no hesitancy in reshaping the common law to new thinking as well as to new conditions, when impelled by a strong sense that justice and the public welfare required it (Funk v. U.S., 290 U.S. 371, 383, 54 S. Ct. 212, 78 L. Ed. 369 (1933), Cowan, "Torts", 10 Rutgers L. Rev. 115, 119 (1955), Stoffer, "Work of Judicial System 1953-1954—the Supreme Court and Stare Decisis 9 Rutgers L. Rev. 1-15 (1954), it rests with this Court to decide the policy and rule to be followed.

4. The Decision Below Should Be Reviewed Because It is In Conflict With The Decision of the Highest Court of a State Within The Same Circuit.

The Supreme Court of New Jersey, which is within the Third Circuit, recently decided in *Immer* v. *Risko*, 56 N.J. 482, 267 A. 2d 481 (1970), that the doctrine of interspousal immunity, which it had applied in an earlier decision, "has no place in a modern society".

> "Although the number of courts opposing the immunity doctrine appears to be growing, our own decision on this matter will not be predicated on a trend in one direction or the other, but on our own view of the policies involved. Since 1958 this court has been closely divided on the issue (see Koplik v. C. P. Trucking Corp., supra; Orr v. Orr, 36 N. J. 236, 238, 1961). The writer of this opinion has joined with the majority in affirming the continuing validity of the immunity doctrine. For the reasons which follow, I have changed my mind and now believe that the immunity doctrine, . . . has no place in our modern society.
>
> • • •

"The court also noted that 'when the policy behind a rule no longer exists the rule should disappear.' . . . Long v. Landy tells us that when the reasons for the immunity are absent, a cause of action should be recognized and enforced by our courts. In other words, the statute did not incorporate immunity, but rather the common law with its inherent capacity for change. In noting that the immunity rule 'should disappear' when the policy behind it no longer exists, it quoted Chief Justice Vanderbilt's often repeated statement in State v. Culver (23 N. J. 495, 505, 1957, cert. denied 354 U.S. 925, 1 L. Ed. 2d 1441, 1957) regarding the fluidity of the common law:

'The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of justice.' " (Id. at 50-51.)

"Although the original basis for the common law immunity doctrine was the theory of legal identity of husband and wife, this metaphysical concept cannot be seriously defended today (see, e.g., Long v. Landy, supra, at 50), where we referred to that concept as 'artificial and technical.' "

The Court below distinguished the foregoing holding in *Immer* v. *Risko, supra,* on the ground that it involved an "automobile negligence case (in which) an insurance company, not a spouse, is ordinarily the true adversary" (Appendix C, page 18a).

It would seem that there is far less reason to believe that "conjugal harmony" can be preserved after a man has wilfully committed a tort against his wife, by depriving her of the right to sue therefor, than there is by barring a suit based upon his negligent operation of an automobile in which she was a passenger.

5. The Decision Below Should Be Reviewed Because It Is In Conflict With The Decision of Another Court of Appeals.

The Court of Appeals for the Fifth Circuit decided, in 1969, that a divorced woman may maintain an action against her former husband for a tort committed prior to marriage. (*Gaston* v. *Pitman,* 413 F. 2d 1031.)

While the petitioner herein was still married to the respondent at the time of the institution of this suit, they have since been divorced. Hence, the one factual difference between the case in the Fifth Circuit and the instant case has been erased. The decision of the Third Circuit, in the instant case, is thus in square and irreconcilable conflict with the decision of the Fifth Circuit on a matter of general law.

Plainly, then, the conflict that has existed between the Courts of divers jurisdictions throughout the United States since Connecticut first decided, in 1914, that the common law principle of interspousal immunity is no longer viable (*Brown* v. *Brown, supra*), has now spread and developed into a square and irreconcilable conflict between different Circuits. Since the vital issue here presented is not episodic but has become troublesome in the administration of justice and is apt to have continuing future consequences, it is respectfully submitted that the writ be granted.

6. The Decision Below Should Be Reviewed Because the Important Constitutional Issue of Equal Protection Is Involved.

Application of the common law principle of interspousal immunity discriminates against women who marry in that it compels them to suffer damages without recourse available to other persons, solely because of their marital status.

The Court of Appeals, while recognizing that the common law principle operates to "classify" married women,

decided that the equal protection clause of the Fourteenth Amendment is not thereby violated because "the legislative interest in preserving domestic tranquility is sufficiently compelling . . . to support the classification" (Appendix C, page 19a).

It is our respectful submission that the deprivation of the right to sue, a fundamental value in the American Constitutional System, should not be so lightly justified.

Indeed, it is our respectful submission that there is not even a reasonable or logical relationship between the denial of the right to sue one's husband for a wilful tort and the preservation of domestic tranquillity. To deem the denial of that right as "compelling" is, in our respectful view, utterly insupportable — and particularly so because a wife's suit against her husband for damage to her property is permitted.

At its core, the issue here presented for review is of exceptional importance in today's social order.

CONCLUSION

For each of the reasons assigned, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LLOYD I. ISLER
Attorney for Petitioner

APPENDIX A

(Memorandum-Opinion of District Court)

IN THE

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 93-1970

—o—

BERT L. PAIEWONSKY,

Plaintiff,

vs.

RALPH L. PAIEWONSKY,

Defendant.

—o—

Plaintiff wife has filed suit against her husband. The complaint consists of two causes of action, as to which there is considerable contention between the parties regarding their real nature.

The complaint is characterized generally by defendant as one seeking relief for fraud and deceit as to love and affection in the inducement of marriage. By way of a label, the action has come to be designated in the caption as an "action for fraud and wilful hurt." Plaintiff denies that her action is one based on fraud and deceit as to love and affection in the inducement of marriage. She contends that each of the causes of action grows out of wilful and outrageous conduct of the defendant which caused her mental and emotional anguish, in compensation of which damages are sought.

As authority for this type of tort, plaintiff relies on Sec. 46 of the Restatement of the Law of Torts, 2d which reads in pertinent part,

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> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . .

It is appropriate to mention at this juncture that the rules of law as promulgated in the Restatements may, in proper instances, be regarded as the statutory law of the Virgin Islands, for

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary. 1 V.I.C. Sec. 4.

There is no law of the Virgin Islands which bars an action in tort for damages based on extreme and outrageous conduct which causes severe emotional distress.

The case is before the Court on defendant's motion to dismiss the complaint. As ground for his motion, defendant asserts, (a) "that the complaint does not contain facts sufficient to constitute causes of action as a matter of law" and (b) "that the doctrine of 'intersponsal immunity' is a total bar to the maintenance of the action." In sum then, plaintiff has moved the Court, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, for the dismissal of the complaint for failure to state claims upon which relief can be granted.

I do not reach defendant's first contention, that ". . . the complaint does not contain facts sufficient to constitute causes of action . . .," for I am satisfied that the applicable statutes of the Virgin Islands have not so far removed the

common law disability of one spouse to sue the other as to permit plaintiff-wife to maintain this suit against her husband.

Both sides have ably and extensively briefed the point of "interspousal disability," and the court is indebted to counsel for having given it the benefit of the latest decisional expressions in this area, as well as of the comments of several of the eminent scholars who have written in this field. No good purpose would be served in reviewing the enlightening and provocative material offered. I restrict my approach to the two propositions which emerge incontrovertible from all of the cases and writings. First, that at common law, husband and wife were one, and that a tort committed by the one spouse against the other gave no rise to a cause of action which could be maintained in any court, regardless of whether the alleged tort were negligent or wilful. The second is that this common law disability prevails to this day, unless removed by legislative enactment.

I direct my attention then to the statutory design of the Virgin Islands under the "Married Woman's Act," as the statutes which have removed the common law disabilities of the wife have come to be popularly known.

The first codification of the laws of the Virgin Islands subsequent to the transfer of this territory from the Kingdom of Denmark to the United States of America was the 1921 code, enacted separately in each of the two then existing municipalities, the Municipality of St. Thomas and St. John and the Municipality of St. Croix. These codes were patterned after the existing statutes of the Territory of Alaska. The codes as adopted in each of the two municipalities contained some variations and differences, but they were substantially similar. In any event, this suit having been brought in the St. Thomas and St. John Division of the Court, my references to the 1921 code will be to that adopted by the Municipal Council for St. Thomas and St. John, and which continued in force

and effect until the enactment, effective September 1, 1957, of the present Virgin Islands Code.

Title 2, Chapter 14 of the code of laws for the Municipality of St. Thomas and St. John abrogated much of the common law disability of a married woman during coverture. In substantially the same language as the present code, it provided that the separate property of the wife was no longer to be subject to the husband's debts. It exempted the real and personal property of the wife, acquired by her own labor, even though during coverture, from liability for the debts, contracts or liabilities of the husband. The wife was made liable for all civil injuries and the husband was absolved therefrom, except as to those cases in which liability would have been joint, absent the marital status. Sec. 6 of that title and chapter provided that,

> contracts may be made by a wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried.

Sec. 7 repealed all laws which imposed or recognized such civil disabilities in the case of the wife which were not similarly imposed or recognized as to the husband. Under this section, the wife, in her own name, and in the same manner as her husband, could appeal to the courts for redress for any unjust usurpation of her property or natural rights.

Title 3, Chapter 3 of the 1921 code provided in Sec. 4,

> a wife may receive the wages of her personal labor, and maintain an action therefor in her own name and hold the same in her own right, and she may prosecute and defend all actions for the preservation and protection of her rights and property, as if unmarried.

Appendix A

The sections of Title 2, Chapter 14 of the 1921 code were adopted in Chapter 1, Sub-Chapter 3 of Title 16 of the present Virgin Islands Code. For some unexplained reason, Sec. 7 of Chapter 14 of the old code was omitted from Title 16. There is no reference to it in the history or revision notes in Title 16. Since careful explanation was given concerning all other sections omitted as obsolete, I can only hazard the guess that the omission was inadvertent. All other sections, critical in the determination of this case, were adopted. Two of the sections, said to be crucial are the present 5 V.I.C. Sec. 72 and 16 V.I.C. Sec. 71 (formerly Title III, Chapter 3, Sec. 4 and Title II, Chapter 14, Sec. 6, respectively, quoted above).

It is urged by the defendant that 16 V. I. C. Sec. 71 deals only with the rights and obligations of a wife arising in contract. Plaintiff maintains, however, that the insertion of the word "liabilities" in that section so extends its breadth that it includes any and all other actions. A comparative examination of Sec. 71 and some of the other sections of the sub-chapter might be fruitful.

Sec. 63 gave the wife the right to maintain an action for the possession or the control of her property—and this I take to be real or personal—or any other right growing out of her property. This section must be deemed to include actions growing out of her property rights against the husband, and even in tort. In Sec. 62, it is decreed that neither spouse has such interest in the property of the other as would make such property liable for the "contract or liabilities" of the other. Sec. 66 absolved each spouse from the "debts or liabilities" of the other, incurred before marriage.

Sec. 68 may be significant because, in speaking strictly of debts or contracts and the responsibility of the wife for the debts or contracts of her husband, it omitted mention of liabilities. Sec. 69, however, returns to the "debts, contracts or liabilities" phraseology and also to exemp-

tions and liabilities. Although sectional headings are not to be considered as part of a statute, it should be noted nonetheless that in the "catch-word" heading of Sec. 70 the word "liability" is used in connection with the civil injuries committed by a married woman and the "damages" which may be recovered against her. The recurrence of the word liabilities and the decisive positions in which it is placed lead me to the conclusion that, as used in Sec. 71, the word was intended to include tort liability. It would follow then that, under the "Virgin Islands Married Woman's Act," a wife during coverture may sue and be sued in tort as well as in contract in her own name and without the joinder of her husband as a party.

The statutory plan which evolves from a consideration of the sections of our law cited above, manifests a clear legislative intent to authorize and empower a wife to acquire and hold property in her own name, to deal at arm's length with her husband as to such property, to fully and solely manage, control and dispose of any property accumulated by her, to be personally liable for such civil injuries as she might incur, to sue, in the protection and preservation of her property and rights, and to be sued in connection with her contracts, or any other liabilities which she might incur. In all of this, the wife was given the right to act as though she were unmarried. The statutes, beyond doubt, gave the wife the power to exercise these rights as against all persons, strangers to the marital union. It is not equally manifest that she was given this unlimited right with respect to her husband.

I do not consider myself privileged to read more into the statute than its words plainly suggest. Had the codifiers, in 1957, mindful of the emerging trend claimed by plaintiff as they must have been, intended to utterly and completely breach the disability of spouses to sue each other generally, they could and would have said so with unmistakable clarity. Certainly, when they came to

grips with the dealings of the spouses, *inter sese,* and wished to remove the "interspousal disability" to sue, they met and dealt with the problem without equivocation, providing in 16 V.I.C. Sec. 63,

> Should either the husband or the wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor, or any right growing out of the same, in the same manner and to the same extent as if they were unmarried.

It is urged that 5 V.I.C. Sec. 72 which empowered a wife to

> . . . prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried.

and 16 V.I.C. Sec. 71, providing that,

> Contracts may be made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried.

were enacted without qualifying exception, and that therefore the removal of the disability must be total and complete, thus authorizing the maintenance of this suit. Such a broad interpretation, however, is negated by the presence in the statutory scheme of 16 V.I.C. 63. Had the Legislature contemplated permitting suits between the spouses in all actions, and had it considered 5 V.I.C. Sec. 72 and 16 V.I.C. Sec. 71 sufficient to accomplish that purpose, what need would 16 V.I.C. Sec. 63 serve? That section would be rendered utterly superfluous and meaningless. Moreover,

the existence of Sec. 63 considered, the maxim *expressio unius est exclusion alterius* indicates that any ambiguity in the statute should be resolved in favor of the more restricted interpretation which I place on the statute.

The position to which I adhere is best summarized by the United States Supreme Court in *Thompson* v. *Thompson*, 218 U.S. 611, 618-619 (1910):

> It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness.
>
> We can but regard this case as another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration."

As we have seen, these provisions of the Virgin Islands Code were lifted directly, *in hdec verba*, from the territorial code of the then Territory of Alaska. Despite the fact that recently the Supreme Court of Alaska has, in

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Cramer v. *Cramer*, 379 P.2d 95 (Alaska 1963), liberally construed language identical to that with which we are here concerned to permit a wife to sue her husband in tort for damages resulting from injuries suffered in an automobile collision between a vehicle driven by her husband and another driven by a third party, I draw support for the construction I have placed on the statute from the few cases which had interpreted those sections of the code as of the time they were adopted. See for example *Decker* v. *Kedly*, 148 Fed. 681 (9 Cir. 1906) cited in Compiled Laws of Alaska Annotated, Title XIII, Chapter 3, under Sec. 860 (our present 5 V.I.C. Sec. 72). In denying a wife relief in an action for damages growing out of the husband's wanton refusal to supply her with necessaries, the Court said,

> . . . It is true that the statutes of Alaska, as do those of many of the states, remove certain disabilities which at common law attend the wife during her coverture, and declare that neither the husband nor the wife shall have an interest in the property of the other, provided that should either obtain the possession of the property of the other the latter may maintain an action therefor in the same manner and to the same extent as if they were unmarried, and make further provision that neither shall be liable for the other's debts. Such statutes do not mean that the husband is answerable to the wife in damages for failure to supply her with the necessaries of life, or for any other act or failure of duty connected with or arising from the marital relation, and it has never been so held. Such a right of action, it is enough to say, has not been conferred by the statutes of Alaska, is wholly at variance with the theory of the marital relation, and is unknown to English or American jurisprudence.

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It is appropriate that, in considering Virgin Islands legislation taken from the Territory of Alaska, I construe such legislation to mean what the courts of Alaska had indicated was its import prior to the enactment of such statutes into the law of the Virgin Islands. *Williams* v. *Dowling*, 318 F.2d 642, 4 V.I. 465 (3 Cir. 1963). *Carib Construction Co., Inc.* v. *Penn*, 342 F.2d 964, 5 V.I. 180 (3 Cir. 1965).

It is in the light of all the foregoing that I conclude that the causes of action sought to be brought by this plaintiff may not be maintained under the laws of the Virgin Islands.

In so doing, I do not overlook the fact that,

> . . . a strong and probably increasing minority view permits the wife to sue her husband for such harms, especially if they are intended wrongs. A few liberal decisions have permitted the action for the husband's negligence. This result seems eminently desirable. The metaphysical and practical reasons which prevented such actions at common law are no longer applicable. The danger to the family peace and tranquillity here, as in the case of suits by an infant against his parents, has been grossly overemphasized. Sound policy and ordinary fairness commend the right of the wife to recover for tortious invasions of her interests in personality by her husband. *Harper & James, Torts*, as quoted from p. 29, plaintiff's Supplemental Memorandum of Law.

I recognize and appreciate the fact as urged by plaintiff that the social order on which the concept of interspousal disability was based, no longer obtains. *Self* v. *Self*, 376 P.2d 65, 66 (Cal. 1962). I call to mind also the words of the late Mr. Justice Oliver Wendell Holmes in his address on "The Path of the Law,"

Appendix A

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down has vanished long since, and the rule simply persists from blind imitation of the past.

Change, one is inclined to agree, is long overdue. Relief, however, must come from the Legislature. Except on clear and unmistakable authority from that body, I am bound to regard so drastic a change, as is here advocated, as beyond the competence of this Court.

ALMERIC L. CHRISTIAN
Chief Judge

Dated: August 12, 1970

APPENDIX B

(Order of District Court Dismissing Complaint)

IN THE

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 93-1970

BERT L. PAIEWONSKY,

Plaintiff,

vs.

RALPH M. PAIEWONSKY,

Defendant.

Upon consideration of the motion of defendant requesting that plaintiffs complaint be dismissed, the Court having heretofore filed its Memorandum and being fully satisfied in the premises.

IT IS ORDERED, that the complaint herein be, and the same is hereby, dismissed.

ALMERIC L. CHRISTIAN
Chief Judge

Dated: August 12, 1970.

APPENDIX C

(Opinion of the Court of Appeals)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,365

BERT L. PAIEWONSKY,

Appellant,

v.

RALPH M. PAIEWONSKY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS—DIVISION OF ST. THOMAS AND ST. JOHN

Argued May 17, 1971

Before SEITZ, VAN DUSEN and ADAMS,
Circuit Judges

(Filed July 21, 1971)

SEITZ, *Chief Judge.*

This case raises the interesting question as to whether the doctrine of interspousal immunity has continuing vitality in the Virgin Islands.

Plaintiff, wife, appeals from an order of the district court of the Virgin Islands granting her husband's motion

to dismiss her complaint against him. Her complaint seeks damages allegedly resulting from defendant's wilful conduct by which he intentionally caused her great humiliation. She alleges that, intending her to rely on the representations, he falsely represented that he loved her, that he wished to marry her so that he could spend his life with her, and that she relied upon this to her detriment in entering into marriage with him. She further claims that the marriage was a plan on his part to obtain a necessary "marriage of convenience" to enable him to secure and retain high public office and that he failed to disclose his intent to terminate the marriage after he had achieved the position, and completed the term of this high office so that she would continue the relationship with him. The district court dismissed the complaint on the ground that the common law doctrine of interspousal immunity wholly barred plaintiff's claim.

We note preliminarily that it is not disputed that the law of the Virgin Islands controls the questions raised in this appeal. Plaintiff asks us to reverse the district court for any of the following reasons: (1) legislation governing the Virgin Islands abrogated the common law doctrine of interspousal immunity and now permits a wife to sue her husband in tort, (2) the doctrine of interspousal immunity should be judicially abrogated, or (3) the restriction against interspousal suits violates the Equal Protection Clause of the Fourteenth Amendment.

The doctrine of interspousal immunity derives from the common law view that a husband and wife have a single legal existence. Consequently it was not legally possible for one spouse to maintain a tort action against the other, for such a suit would necessarily involve a suit by a legal entity against itself. Many American jurisdictions have either substantially eroded the immunity doctrine or entirely abrogated it. However, at the last reading a majority of the states retain it despite frequent attacks on its under-

lying policy justifications. The justification for the doctrine is that it serves to further a policy of domestic harmony because tort actions between spouses tend to destroy harmony in the marital relationship. It is also claimed that the doctrine serves to minimize the danger of fictitious, fraudulent, and trivial claims. Thompson v. Thompson, 218 U.S. 611, 614-15 (1910); Prosser Handbook of the Law of Torts 875-85 (3d ed. 1964); 1 Harper & James, Torts § 810, at 643-47 (1956); 41 C.J.S., *Husband and Wife* §§ 396, et seq.; 43 A.L.R. 2d 626 (1969 Later Case Service). We turn to plaintiff's contentions against this background.

Plaintiff contends that the legislation now governing the Virgin Islands, when read in conjunction with certain provisions of the earlier Code, reflects an intent to completely abrogate the common law doctrine of interspousal immunity. Her reasoning goes this way: Title 2, Ch. 14, § 7 of the 1921 Code constituted a positive legislative retention of the common law immunity doctrine; that provision was omitted from the present governing Code adopted in 1957; and such omission shows that the legislature intended to abrogate the doctrine. The soundness of plaintiff's reasoning is dependent upon the validity of her major premise that Title 2, Ch. 14, § 7 of the 1921 Code affirmatively incorporated the entire common law interspousal immunity doctrine. That section provided:

> "*All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed;* and for any unjust usurpation of her property or natural rights she shall have the same right to appeal in her own name alone to all courts for redress that her husband has." (Emphasis supplied.)

Section 7 is typical of many of the Married Women's Acts which were adopted throughout the United States in order to eliminate certain civil inequities in the status of a

married woman. The italicized language of the statute shows that the statute speaks solely to disabilities applicable to only the wife—not mutual disabilities. The immunity doctrine, however, not only bars the wife from suing the husband but, of importance, it also bars the husband from suing the wife.[1a] Thus, the quoted provision in the 1921 Code cannot be considered as a positive legislative enactment of the immunity doctrine.[1a] Rather, it refers to actions by or against third parties. It follows that the omission from the present code of the pertinent portion of § 7 is no evidence that the legislature intended to repeal the doctrine.

Plaintiff next argues that Title 16, Ch. 1, § 71 of the present Virgin Islands Code should be given a broad interpretation which would in effect abrogate the doctrine of interspousal immunity. Section 71 provides that:

> "Contracts may be made by the wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried."[2]

Assuming that § 71 is applicable to tort actions, we think the Legislature must be considered to have enacted it against the background of the common law doctrine of interspousal immunity. At common law a wife could not bring suit against a third party or be sued by such party

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[1] Prosser, Handbook of the Law of Torts 880 (3d ed. 1964).

[1a] The doctrine was made applicable to the Virgin Islands by the following provisions of the 1921 Code:

"The common law of England as adopted and understood in the United States shall be in force in this District, except as modified by this ordinance." Title IV, ch. 13, § 6, of the 1921 Codes for the Municipality of St. Thomas and St. John, and the Municipality of St. Croix, respectively.

[2] See also 5 V. I. C. § 72.

unless her husband was made a party to the suit. Speaking of a similar problem of statutory interpretation the Supreme Court said: "Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness." Thompson v. Thompson, *supra* at 618. The legislature did not so express itself. We are therefore guided by the familiar principle of statutory construction that statutes in derogation of the common law are to be given a strict construction and shall only abrogate that portion of the common law expressly indicated [2] or necessary to render its provisions effective. Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907); Bauers v. Heisel, 361 F.2d 581, 587 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967). In these circumstances a proper construction of §71 would therefore permit a wife to bring suit against a third party without joining her husband but would not authorize her to bring suit against her husband because the statute serves a meaningful purpose without being construed to abrogate the immunity doctrine.

Plaintiff asserts, however, that §71, adopted in 1957, was modeled after what was the territorial code of the then Territory of Alaska. She says that since the Supreme Court of Alaska later liberally construed the identical language to permit a wife to sue her husband in tort, Cramer v. Cramer, 379 P.2d 95 (Alas. 1963), we should feel

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[2] *Cf.* 1 V. I. C. § 63.

compelled to follow a similar course.[4] However, at the time the Virgin Islands adopted § 71 in 1957, the last pronouncement by a court having jurisdiction over the Territory of Alaska had interpreted the language in a manner which continued the common law bar to interspousal suits. *E.g.*, Decker v. Kedley, 148 Fed. 681 (9th Cir. 1906). Under the rule of statutory construction which we must follow in considering Virgin Islands legislation taken from other jurisdictions, we must presume that the enactment of § 71 was intended to carry with it the previous judicial interpretations placed upon the language of the Alaskan statute by the court having jurisdiction over that Territory. Williams v. Dowling, 318 F.2d 642, 643-44 (3d Cir. 1963).

We believe that when the Virgin Islands Legislature adopted § 71 it must be considered to have intended to retain the doctrine of interspousal immunity. We also conclude that the legislature in adopting the statute continued to believe that the policies upon which the common law doctrine was based continued to have vitality. Despite opinions expressed in some jurisdictions, we think that the issue is, upon the fact of this case, still susceptible to serious debate. We therefore conclude that at least at this time resolution of the question is more appropriate for legislative treatment. Since the legislature has been silent thereon, we are governed by 1 V.I.C. § 4 which states that:

> "The rules of the common law, as expressed in the restatement of the law approved by the American Law Institute, and to the extent not so expressed, as

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[4] It is possible to distinguish *Cramer* on the facts since it involved a claim for injuries resulting from an automobile accident and not a claimed intentional tort going to the basis of the marital relationship. Some jurisdictions which have abrogated the immunity doctrine have done so only in automobile negligence cases since an insurance company, not a spouse, is ordinarily the true adversary. *E.g. Immer* v. *Risko*, 56 N. J. 482, 267 A.2d 481 (1970).

> generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands. . . ."

Since the Restatement of Torts explicity refrains from speaking to the question of interspousal immunity,[5] we look to the common law as generally applied in the United States. As we have stated, the common law even with many of its modifications would bar the present action. Hence, we do not accept plaintiff's view that we should judicially abrogate the doctrine in the factual situation alleged in her complaint.[6]

Finally plaintiff claims that the doctrine of interspousal immunity discriminates against women who marry in that it compels them to suffer damages, without recourse available to other persons, solely because of their marital status. This classification, plaintiff asserts, violates the Equal Protection Clause of the Fourteenth Amendment. Since we have not been convinced that the immunity doctrine lacks substantial vitality, we think it follows that it has a reasonable relationship to the interest sought to be furthered by it. In sum, we believe that the legislative interest in promoting domestic tranquility is sufficiently compelling upon the facts of this case to support the classification in question. See also Locklair v. Locklair, 256 F. Supp. 530 D. S. C. 1966). Any change is still for the Legislature.

The order of the district court will be affirmed.

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[5] Restatement of Torts, § 887 Comment b.

[6] We have not overlooked the fact that some jurisdictions have abrogated the common law doctrine of interspousal immunity in cases involving the intentional torts.

APPENDIX D

(Judgment of Affirmance of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,363

BERT L. PAIEWONSKY,

Appellant,

vs.

RALPH M. PAIEWONSKY.

(D. C. Civil Action No. 93-1970)

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Present:

SEITZ, *Chief Judge*, and VAN DUSEN and ADAMS,
Circuit Judges.

This cause came on to be heard on the record from the District Court of the Virgin Islands, Division of St. Thomas and St. John, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed August 12, 1970, be, and the same is hereby affirmed. Costs taxed in favor of Appellee.

Attest:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

July 21, 1971

APPENDIX E

(Denial of Sur Petition for Rehearing by the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,365

BERT L. PAIEWONSKY,

Appellant,

v.

RALPH M. PAIEWONSKY,

Appellee.

Present:

SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, and ROSENN, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for reharing and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

SEITZ
Chief Judge

Dated: September 1, 1971

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-700

BERT L. PAIEWONSKY,

Petitioner,

against

RALPH M. PAIEWONSKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-700

BERT L. PAIEWONSKY,

Petitioner,

against

RALPH M. PAIEWONSKY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

References to the opinions below are adequately set forth in the petition. Respondent does not concur in their explication set forth in summary fashion at p. 5 of the petition and elsewhere therein at greater length.

Question Presented

Whether a state, in conformity with its policy of promoting the marital relationship, may properly employ the common-law doctrine of interspousal immunity so as to bar its courts from hearing certain kinds of claims which either strike at the heart of the marital relationship or invite the collusion of both spouses in a quest for imposing liability on a third party.

Constitutional and Statutory Provisions Involved

The provisions of the United States Constitution, of 42 U.S.C. § 1981 and of the Virgin Islands Code relied upon by petitioner are set forth in the petition at pp. 2-3.

Also pertinent is 16 Virgin Islands Code § 673, which reads as follows:

> "Should either the husband or the wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor or any right growing out of the same, in the same manner and to the same extent as if they were unmarried."

Facts

The "factual" recitation given in the petition (pp. 4-5) differs in a variety of ways from the allegations set forth in the complaint. Additionally, that recitation suffers from an inaccuracy of historical detail which is manifest upon its face. The absurdity of the claim that respondent, in January of 1960, when the parties contemplated marriage could have known that Senator John F. Kennedy would receive the Democratic nomination for the Presidency in the summer of that year, be elected to that position in November of that year, and upon that basis conclude that he was likely to be appointed Governor of the Territory is charming indeed.

For the purposes of this litigation in its present posture, however, the allegations of the complaint are of course deemed to be true. We have thus annexed to this brief a copy of the complaint (Appendix A), which we respectfully suggest is the sole presentation of those "facts" which are properly before the Court.

ARGUMENT

Eternity is passion; girl or boy
Cry at the onset of their sexual joy
'Forever and forever,' then awake
Ignorant what Dramatis Personae spake.

—W. B. Yeats

What's sauce for the goose is sauce
for the gander.

—an old recipe

For better or for worse, the marital relationship has from time immemorial been the beneficiary of religious and secular promulgations designed to foster its tranquility. Some of these, experience proved, worked injustice, and came to be abrogated or modified. Others continue pretty much in force today.

Whatever one may think about the legal fiction that forms the theoretical substrate of the doctrine of intersponsal immunity, one thing is readily apparent: that doctrine effectively barred all judicial interference with the assumed tranquility of the matrimonial relationship. One might, where proper statutory foundation existed, have sued for divorce or some other remedy terminating the marital relationship; but so long as that relationship remained viable, the doctrine of interspousal immunity effectively barred the courts from intruding upon the affairs of husband and wife.

Experience, as we have observed, has led the competent legislative bodies of a variety of jurisdictions—among them, the Virgin Islands—to conclude that the absolute doctrine of interspousal immunity should be modified to accord some limited access to the courts in litigation—other than classic matrimonial litigation—between husbands and wives. Such enactments sometimes confer the right to sue *ex contractu,* and sometimes *ex delictu.*

Whether the statutes speak of contract or tort, of property or personal rights, they have this much in common: as a rule, they continue the unavailability of judicial redress where the remedy sought is money damages and the gravamen of the action is alleged tortious conduct which involves, as does the alleged tortious conduct set forth in the complaint herein, the very essense of the marital relationship. See, e.g., *Weicker* v. *Weicker*, 28 App. Div. 2d 138, 283 N.Y.S. 2d 385 (1st Dep't, 1967), *aff'd*, 22 N.Y. 2d 8, 290 N.Y.S. 2d 732 (1968).

In the present case, petitioner alleges in substance that respondent fraudulently cried "forever and forever" and then, for a finite period of time, persisted in those fraudulent avowals, thereby entitling her to recover money damages. The District Court held that Virgin Islands law precluded the maintenance of such a suit, and dismissed the complaint. In so doing, the District Court declared the law of the Territory with the same force and authority as if it were the highest court of a state declaring the law of its jurisdiction, *Stainback* v. *Mo Hock Ke Lok Po*, 366 U.S. 368, 383 (1949). The Court of Appeals, in affirming, held that the construction of Virgin Islands statutes and common law by the District Court was in no manner incompatible with paramount federal law. Both courts correctly noted that only the legislature could properly authorize the maintenance of a suit such as the one presently at bar. See *Thompson* v. *Thompson*, 218 U.S. 611 (1910).

We submit that this Court is bound by the District Court's construction of Virgin Islands law, and that any question about the social utility of the territorial statutes involved in this litigation may only be determined by the appropriate legislative body, unless it can be affirmatively demonstrated that the statutes, or the underlying common law, are repugnant to the United States Constitution.

Petitioner, by harping upon the proposition that this litigation involves a suit by a woman against a man, seeks to invoke the "equal protection" clause of the Fourteenth Amendment to the United States Constitution in her efforts to set aside the judgments of the courts below. In doing so, petitioner ignores the fact that the underlying doctrine of interspousal immunity cuts both ways, and that at common law, a husband could not maintain against a wife the kind of suit with which petitioner presently seeks to burden this Court.

I.

The decision below is clearly correct.

The Court of Appeals, in a meticulous analysis of the problem before it, noted that 1 Virgin Islands Code § 4 provides:

> "The rules of the common law, as expressed in the restatement of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands . . ." (Petition, pp. 18a-19a).

It cannot be disputed that the doctrine of interspousal immunity is part of the common-law tradition and that in the majority of American jurisdictions it retains its full vitality (43 A.L.R. 2d 632); and therefore the function of the courts below was to determine whether other provisions of the Virgin Islands Code so altered that doctrine as to authorize the maintenance of the present action. In light of the familiar proposition that statutes in derogation of the common law are to be strictly construed, it is manifest, we respectfully submit, that the court below correctly parsed the language before it in reaching the conclusion that the present action, which would have been

barred at common law by the doctrine of interspousal immunity, is not exempted from that bar by any provision of the Virgin Islands Code.

II.

This Court should not review the decision below upon the ground, asserted by petitioner, that it is "based upon an archaic common law principle that is ripe for re-examination".

Petitioner, in her Point 1, in effect argues that the Court should substitute its judgment for that of the highest court of a state or territory irrespective of any conflict between the judgment of the state or territorial court and principles of the federal Constitution or statutes. This is to ask that the Supreme Court impose upon the states and territories its own, soon-to-be fashioned common law for no better reason than the possibility that "a uniform rule" (Petition, p. 14) might perhaps be socially desirable.

As every American lawyer knows or should know, both common law and statutory principles vary widely among the states: as an academic discipline, the subject of conflict of laws is uniquely American. Things would doubtless be much easier for the harried practitioner if one body of decisional authority obtained throughout the nation, but to achieve that end, a major redrafting of the Constitution would be required.

At any rate, there would seem to be no reason presented in the present litigation for the disavowal of the long-standing tradition that review by this Court is limited to federal issues, and may not properly encompass the reconsideration of a state or territorial common-law principle upon the mere assertion by a party that it is "archaic"

or contrary to the present minority view.* See *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); 7B Moore's Federal Practice (1971) § 1257.

III.

This Court should not review the decision below upon the ground, asserted by petitioner, that it is "in conflict with decisions throughout the United States whose judgment is final in the absence of Supreme Court review".

Petitioner, in her Point 3, patently misconceives the nature of our federal system when she asserts that there is some "conflict" of decisional authority between the holdings of the courts below and the rulings of an Alaska court, for it is manifest, at the very least, that each court merely interpreted a specific legislative enactment. To say, as petitioner does (p. 15), that the holdings of the courts below "would require the courts of the remaining states which have not dealt with the question, to look to the legislatures of their own states for enactment of new statutes which would 'express in terms of irresistible clearness' (*Thompson, supra*) an intent to abrogate the common law doctrine of interspousal immunity," is an exercise in absurdity, for it is a hornbook proposition that the decision of the highest court of one jurisdiction construing a statute enacted by the legislature of that jurisdiction has no binding precedential effect upon the courts of a second jurisdiction when construing a statute enacted by their legislature even though the two statutes are identical in text.

Petitioner's reference to *Funk* v. *United States*, 290 U.S. 371 (1933) is inapposite, for in that case, all the Court

* The authorities comprising the minority view claimed by the Petitioner to be the correct one are discussed in Appendix B.

did was to declare, in the absence of congressional treatment of the subject, a rule of evidence to be applied solely in lower federal courts. In later cases, the Court took pains to observe that its power to reshape common-law doctrine rested on its situation at the apex of the structure of the federal judicial system, and might properly be employed only in the declaration of federal law in the absence of congressional mandate. Not only did this Court declare itself impotent to refashion state common law, but it also held that it lacks the power to refashion the common law of a jurisdiction other than a state—like the Virgin Islands—even though its courts are federal, rather than state, courts, See *Fisher* v. *United States*, 328 U.S. 463 (1946); *Griffin* v. *United States*, 336 U.S. 704 (1949).

IV.

There is no conflict of decision.

In Point 4 of the petition, the novel argument is advanced that this Court should review the substance of the present litigation because of an asserted conflict of decision between the holdings of the courts below and a declaration of the Supreme Court of New Jersey construing the law of that state. Apart from the proposition, adverted to above, that there can really be no conflict when the courts of two jurisdictions construe their own laws in ways that differ as dramatically as opposite constructions of statutes identical in text, it is plain, as pointed out by the Court of Appeals (petition, p. 18a), that *Immer* v. *Risko*, 56 N.J. 482, 267 A.2d 481 (1970) concerned so vastly different a nexus of events from what is herein presented that the strict holdings of both courts—shorn of various kinds of dicta—could have emanated the same day from the same

forum.* All that apples and oranges have in common, after all, is that they are both species of fruit.

In Point 5 of the petition, it is claimed that the decision of the court below is in conflict with that of the Fifth Circuit in *Gaston* v. *Pitman*, 413 F.2d 1031 (5th Cir. 1969). However, once again, no conflict is presented, because in that case, the sole question presented was whether Florida law permitted a divorced woman to sue her former husband to recover damages for the wrongful death of her minor child which occurred prior to the parties' marriage; and that question was answered in the affirmative by the Supreme Court of Florida, upon the question's having been certified to it by the Court of Appeals. Since the nearest thing to a "conflict" between the *Gaston* case and the present litigation is between the highest court of a state and a United States court of appeals, it is plain that there is no true conflict among the circuits; moreover, what we have said about the asserted "conflict" between *Immer* v. *Risko* and the decision of the court below is equally applicable in this context.

V.

There is no conflict between the decisions below and principles of the federal constitution or statutes.

In her Point 2, petitioner asserts that the decisions below are in violation of the provisions of 42 U.S.C. § 1981,

* In the penultimate paragraph of its opinion, the New Jersey court in *Immer* v. *Risko* observed:

> *"In departing from the old rule, we explicitly limit our decision to claims arising out of motor vehicle accidents*: There are obviously some areas in the relationship between husband and wife that courts should not become involved in. We cannot decide today any more than what is before us, and the question of what other claims should be entertained by our courts must be left to future decisions" (emphasis supplied).

and then quotes from that statute snippets which might make it appear that it is illegal for a court to dismiss a complaint for failure to state a cause of action. The trouble with this argument—apart from the proposition that the right to sue is no guarantee that the plaintiff will invariably succeed—is that it ignores the history of the statute, as well as its complete text. Originally enacted (Act of May 31, 1870, 16 Stat. 144) in the period of Reconstruction following the Civil War, the statute's purpose was to emphasize the proposition that diverse treatment of individuals because of their color was no longer to be tolerated. Thus:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other."

Nowhere in the record does there appear any intimation that petitioner is not a "white citizen" as that term is used in the statute; therefore, *a fortiori*, she cannot claim that she was treated differently from a white citizen, and cannot properly invoke the sway of 42 U.S.C. § 1981. Moreover, even if that statute might properly be construed to render unlawful disparate treatment of men and women, it is plain that nothing of the sort exists in the present case, for the complaint was dismissed upon the doctrine of interspousal immunity, and that doctrine is equally applicable to husbands and wives.

In her Point 6, petitioner mischaracterizes the reasoning of the court below to make it seem that it declared that "the legislative interest in promoting domestic tranquility is sufficiently compelling" to warrant discrimination

against women *as such*. Actually, what the court did was to dispose of petitioner's argument that the doctrine of interspousal immunity is unfair because thereunder a married woman is precluded from suing her husband for damages in a situation where a mistress might properly maintain an action against her paramour. Certainly the court below did not in any way suggest that the doctrine of interspousal immunity might be applied one way to wives and another way to husbands.

The only question of "classification," therefore, is between married people and unmarried people. A holding by this Court that such a classification is improper under the Equal Protection Clause of the Fourteenth Amendment would be the erasure not only of centuries of common-law wisdom, but of much of federal and state statutory law as well. Clearly, the petition sets forth no compelling reason why this Court should be called upon to engage, by way of judicial legislation, in so vast a program of social experiment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the present petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

(Complaint)

(DOCUMENT No. 1)

IN THE

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

[SAME TITLE]

Plaintiff, by her attorneys, complaining of the defendant, respectfully alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a resident of and domiciled in the Virgin Islands of the United States, residing at Botezburg, St. Croix, Virgin Islands.

2. Defendant is a resident of and domiciled in the Virgin Islands of the United States, residing in St. Thomas, U.S. Virgin Islands.

3. Upon information and belief, prior to March 1960, a decree of divorce was entered severing the bonds of matrimony then existing between defendant and his then wife.

4. At the time of the entry of said decree of divorce and prior to March 12, 1960, defendant was, upon information and belief, prominently identified with and active in business, politics and a wide spectrum of community and civic affairs and aspired to high political office.

5. Upon information and belief defendant undertook to and did expend considerable efforts and monies in connection with and in furtherance of his ambition and aspirations, as aforesaid.

6. Upon information and belief prior to March 12, 1960, defendant believed and knew or had reason to believe and

know that there was an opportunity for him to gain appointment as Governor of the U.S. Virgin Islands.

7. Upon information and belief defendant learned, believed and knew or had reason to believe and know that the opportunity to gain such appointment as Governor of the U.S. Virgin Islands and to thereafter retain such position would be thwarted or diminished if he did not off-set the implications of his prior divorce and change his status from that of a divorced man.

8. Upon information and belief, defendant learned, believed and knew or had reason to believe and know that the opportunity to gain appointment as Governor of the U.S. Virgin Islands and to retain such position would be enhanced if he were married and to a woman who would contribute to his stature as a person of stability and maturity and who would aid in establishing for him the image and reputation of solidity and graciousness.

9. Prior to March 12, 1960 defendant stated and represented to plaintiff that he was in love with her, that his happiness depended upon having her love and companionship and that he wished to marry her so that he could spend his life with her.

10. Upon information and belief the statements and representations made by the defendant, as aforesaid, were false and were made with the intent that the plaintiff should rely and act thereon.

11. Plaintiff did believe and did rely and act up on the statements and representations so made by the defendant and was induced thereby to and did marry the defendant on March 12, 1960.

12. Upon information and belief, at the time that the defendant made the statements and representations as aforesaid, they were false and in truth and fact defendant

merely wished to present himself as a person possessed of the attributes of stability and morality generally associated with the married status so as to enhance the possibility of his appointment to the Governorship of the U.S. Virgin Islands and to gain and assure for himself, the continued presence and services of the plaintiff.

13. Upon information and belief at the time the defendant made the statements and representations as aforesaid, defendant wished merely to attain for and endow himself with the benefits which would accrue from his marriage to the defendant whose abilities and reputation were known to the defendant to be held in high regard and to obtain from the plaintiff, through his marriage to her, the services and functions which she, as first lady of the U.S. Virgin Islands, would be called upon to render and exercise and which, defendant knew or had reason to believe, would be of invaluable aid and assistance in establishing and maintaining for himself the public image of solidity and graciousness.

14. Following the plaintiff's marriage to the defendant on March 12, 1960 John F. Kennedy, the then President of the United States did appoint defendant to be Governor of the U.S. Virgin Islands.

15. Following defendant's marriage to plaintiff, plaintiff did act as official hostess as first lady of the U.S. Virgin Islands and in the ensuing nine years did render services and exercise functions which aided the defendant in establishing and maintaining the public image which he desired to generate and maintain and which operated to keep him in public office until March 1969.

16. Following the completion of the defendant's term as Governor of the U.S. Virgin Islands defendant, without reason or justification, abandoned plaintiff and initiated an action for divorce against her.

17. The defendant's abandonment of the plaintiff and initiation of a divorce action, as aforesaid, was due and occasioned, upon information and belief, by defendant's determination that he would no longer hold public office and that he therefore did not require the continued presence, services and functions of the plaintiff and maintenance of the public image which he had gained through marriage to the plaintiff.

18. By reason of the facts aforesaid plaintiff has suffered great humiliation and damage and for which plaintiff seeks recovery in the sum of Ten Million ($10,000,000.00) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION

19. Plaintiff repeats and realleges each and every allegation contained in paragraphs marked and number "1" and "2" with the same force and effect as if fully set forth at length herein.

20. Prior to March 1960, defendant's then wife instituted an action for divorce against him.

21. Following the entry of the decree of divorce severing the bonds of matrimony between defendant and his then wife, defendant married the plaintiff.

22. Upon information and belief, following such marriage, defendant and his former wife expressed their mutual regret that their marriage had terminated in divorce and discussed the eventuality of their remarrying each other.

23. Upon information and belief defendant knew or had reason to believe that a termination of his marriage to plaintiff while he held the office of Governor of the U.S. Virgin Islands would injure and damage his image and

reputation and adversely affect his tenure as Governor of the U.S. Virgin Islands.

24. Upon information and belief, defendant schemed and planned to continue his marriage to plaintiff only for so long as he was concerned with and desired to maintain his image and reputation for stability and maturity and hold the office of Governor of the U.S. Virgin Islands and to then terminate his marriage to plaintiff and remarry his former wife.

25. Defendant did not disclose or otherwise make known to plaintiff his design, scheme and plan, as aforesaid who relied upon the defendant's continued expressions of love for her and his admiration, appreciation and need for her presence.

26. Because of the defendant's failure to disclose or otherwise make known to plaintiff his design, plan and scheme, as aforesaid, plaintiff was prevented from knowing thereof and continued to reside with defendant in the marriage relationship and to perform and render all services as a wife and to perform, render and exercise the services and functions required or expected of her as the official first lady of the U.S. Virgin Islands.

27. Defendant's failure to disclose to plaintiff or otherwise make known to her his design and plan to terminate his marriage to her at such time as he would no longer wish to hold high political office was intentional, wilfull, wrongful and in total disregard of plaintiff's interests, health, sensibilities and dignity as a human being.

28. Defendant's acts and conduct as aforesaid were without regard to the rights and entitlements of the plaintiff and were occasioned solely out of a selfish interest for and concern with his own political and social aspirations and experiences.

29. Following completion of his term as Governor of the U.S. Virgin Islands defendant, without reason or justification, abandoned plaintiff and initiated an action for divorce against her with the purpose and intent of being free to re-marry his former wife.

30. By reason of the facts aforesaid plaintiff has suffered great damage, prejudice and hurt for which she seeks recovery and for which she claims, in addition, punitive damages, for a total of Twenty Million ($20,000,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Ten Million ($10,000,000.00) Dollars on the first cause of action and in the sum of Twenty Million ($20,000,000.00) Dollars on the second cause of action, together with the costs of this action.

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(Verified by Plaintiff on March 19, 1970.)

APPENDIX B

(Authorities of Minority View Claimed to be Correct by Petitioner)

In Point 1 of the petition, it is claimed that the views of nineteen American jurisdictions from which cases are cited at pp. 8 and 9 constitute the "prevailing judicial opinion by the courts throughout the United States" (petition, p. 8), contrary to the decision of the court below. Apart from the difficulties with petitioner's arithmetic, the cases cited do not, as we shall demonstrate, support her thesis. Similarly, petitioner mischaracterizes scholary authority with charming abandon. At pp. 12 and 13 of the petition appears a quotation from 1 HARPER & JAMES ON TORTS which is offered as authority for the proposition that the leading contemporary scholars subscribe to the theory that a suit such as the present one may properly be maintained. The quoted material speaks of "such harms," but does not indicate the antecedent. The immediately preceding paragraph of HARPER & JAMES makes it clear that "such harms" are violent physical injuries, primarily wrongful death, whether deliberately or negligently caused.

We shall now consider, in order, the cases cited at pp. 8 and 9 of the petition. Those cases, the careful reader will have observed, are collected as the "minority view" at 43 A.L.R. 647.

Brown v. *Brown*, 89 Atl. 889 (Conn. 1914) was an action in contract.

In *Fiedler* v. *Fiedler*, 140 Pac. 1022 (Okla. 1914), the statutes involved went far beyond those presently at bar in abrogating the doctrine of interspousal immunity, and were construed in the light of a tradition in that jurisdiction, mandated by its legislature, abolishing the common-law rule that statutes in derogation thereof are to be strictly construed. Thus, as the court observed at p. 1024:

> "But aside from the philosophy on the one side or the other, it appears to us that the plain English

language of our Constitution and statutes should enable us to determine what the rights of a married woman are intended to be in such cases. Section 6, act 2, of the Constitution of Oklahoma, provides: 'The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.' From the language of this section of the Bill of Rights, it appears to us that the framers of our Constitution clearly intended to open the courts of justice to every person, no matter whom, for redress of wrongs and for reparation for injuries.

In furtherance of such intention, our Legislature, realizing the harsh rules of the common law in such matters, has provided section 3353. Rev. Laws 1910: '*Woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man*; and for any injuries sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone. * * *' (Emphasis supplied.)

Section 2845, Rev. Laws 1910, provides: 'Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damage.'

Section 2846, Id., defines what is meant by a detriment as follows: 'Detriment is a loss or harm suffered in person or property.'

Appendix B

> The foregoing statutes, it seems to us, are sufficiently clear to define the rights of persons, without discrimination or distinction, and to enable all persons to know just what their rights are and the courts to know just how to adjudicate them. But our Legislature, possibly in contemplation of such contingencies, and in order to avoid the reading into the statutes a meaning not intended, or at least in further emphasis of its intention, has made other provisions. Section 2914, Rev. Laws 1910, reads: 'Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.'
>
> And in order to make itself still more clear as to its intentions, the Legislature in Section 2948, Id., said: '*The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state, which are to be liberally construed with a view to effect their objects and to promote justice.*' (Emphasis supplied.)
>
> Construing these statutes and constitutional provisions as a whole, we think it is clearly manifest that the legislative intent has been an endeavor to shake off the shackles of the common-law rules as to the rights of married women and to clearly define such rights."

Similarly, the statute involved in *Gilman* v. *Gilman*, 95 Atl. 657 (N.H. 1915) clearly demonstrated an intent to authorize husbands and wives to sue one another in tort. As the court observed:

> "If this language is given its ordinary meaning, she can maintain this action, provided she could

> maintain it if she were a single woman; for the statute provides in terms that, with certain exceptions not material here, she may sue and be sued in all matters as though she were unmarried. In other words, when the Legislature enacted this section it intended to remove all the disabilities the common law imposed on married women in so far as the right to sue was concerned, and, with certain exceptions, to put husband and wife on an equality in respect to property, torts, and contracts."

The *Gilman* case represents merely construction by a state court of a statute far different in its text from those presently involved; and does not, as petitioner contends, in any manner appear in conflict with the result reached by the courts below in construing a differently-worded statute.

Again, the Alabama case of *Johnson* v. *Johnson*, 77 So. 335 (1917), was predicated upon a remarkably different statute. As the court noted at p. 337:

> "[1] It is conceded, of course, that at the common law no such action could be maintained. That law regarded the husband and wife, for judicial purposes, as but one person, and, we may add, the husband was that person. Hence the rule to which we have referred and one result that husband and wife could not contract with or sue each other. While much of that law has disappeared under the pressure of a public opinion steadly growing in enlightment, it must still be conceded that *it is not for the courts by sudden strokes of policy to make deep innovations upon the established law:* We think, then, that the question now before us may be appropriately stated in the following form: Have our statutes on the subject of the rights of married woman left unchanged the theory of legal identity, of old the

foundation of the marital status, merely providing exceptions to the necessary consequences of that theory, or has that foundation been so substantially changed that, except as disabilities have been retained, each has against the other all the rights of persons not so related? Under our statutory system, our opinion is that the latter alternative may and should be adopted.

Section 4492 of the Code provides 'the wife has full legal capacity to contract as if she were sole, except as otherwise provided by law,' 'The husband and wife may contract with each other,' etc. Section 4497. '*All damages which the wife may be entitled to recover for injuries to her person or reputation are her separate property.*' Section 4489. '*The wife must sue alone* • • • *for injuries to such property,* • • • or *for all injuries to her person or reputation,*' *etc.* Emphasis supplied. Section 4493. There are other sections bearing more or less remotely upon this subject. It may be said that the last-quoted section was not enacted with a view to precisely the case here presented; but these sections, the last included, have the effect of abrogating the fiction of legal identity, and seem thereby, except as otherwise prescribed, to destroy the foundation of the common law in its application to questions touching the rights of husband and wife inter se."

The North Carolina statute construed in *Crowell* v. *Crowell*, 105 S.E. 206 (1920) explicitly conferred upon a wife the right to maintain an action against her husband; and, again, all the court did was to construe a statute markedly different in its text from the ones presently involved. The North Carolina courts, interestingly enough, have adhered to the proposition that a statute in derogation of the common law must be strictly construed, for in a later decision, *Scholtens v. Scholtens*, 52 S.E. 2d 350, it was held

that the statute in question might not be construed to authorize the maintenance of a suit by a husband against his wife.

The statute construed by the South Carolina court in *Prosser* v. *Prosser*, 102 S.E. 787 (1920) explicitly provided access to the courts by a married woman "when the action is between herself and her husband."

In *Waite* v. *Pierce*, 209 N.W. 475 (Wisc. 1926) the court construed a statute broader in scope than the one at bar as authorizing the maintenance of a suit for damages by a wife against her husband.

In *Katzenberg* v. *Katzenberg*, 37 S.W. 2d 696 (Ark. 1931), the statute explicitly provided, as the court noted, its intention "to remove all statutory disabilities of married women as well *as common law disabilities*" *id*, at 696, emphasis supplied).

Fitzmaurice v. *Fitzmaurice*, 242 N.W. 526 (N. Dak. 1932) also involved the construction of a statute markedly different from the one at bar. As the court observed at p. 527:

> "In the absence of legislative enactment, the common law is in effect in North Dakota. Sections 4328, 4331, C.L. 1913. Plaintiff, however, insists that the Legislature has spoken in this behalf, and that the statute, section 4411, C.L. 1913, providing: 'Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which the other might, if unmarried. The wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage, and in all actions by or against her she shall sue and be sued in her own name'—clothes her with both the right and the capacity to recover damages against her husband on account of his torts. Section 4331, provides: "In

this state there is no common law in any case where the law is declared by the codes.'"

At pages 529, the court concluded:

> "But taking into consideration the growth and development of the idea of the emancipation of the wife and of the equality of husband and wife before the law as disclosed by the history of our legislative enactments, we hold that in this state the common-law rule is wholly abrogated, and that a wife may sue her husband for a personal tort."

Again, in *Rains* v. *Rains*, 46 P.2d 740 (Colo. 1935), the state court was careful to point out that the predicate of the interspousal litigation therein presented was an explicit state constitutional mandate, in addition to a statute broader in scope than the one at bar. As the court declared at p. 743:

> "Section 6, article 2, Colorado Constitution, is as follows: 'That courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character. * * *' In this state a wife, as we have seen, is a person independent of the husband, and this section guarantees her a remedy for every personal injury without making any exception as to the person inflicting the injury, who may be her husband or a third person. Section 5577, Compiled Laws, provides: 'Any woman may, while married, sue and be sued, in all matters having relation to her property, person or reputation, in the same manner as if she were sole.' Here, also, there is no exception as to the person she may sue.
>
> Section 6 of the Code of Civil Procedure is as follows: '*A married woman may sue, and be sued in all matters, the same as if she were sole.*' There is no exception as to the person she may sue.

Appendix B

> It is urged with some force that this section relates to procedure only, and does not confer a substantive right. But that objection cannot be urged successfully against section 6, article 2, of the State Constitution or section 5577, Compiled Laws, quoted above." (Emphasis supplied)
>
> • • •
>
> "In view of the broad, liberal provisions of the Constitution and statutes of this state and the liberal construction thereof adopted by the courts of this state, we are unwilling to follow the decisions of courts that hold that a wife has no right to sue her husband for a personal injury caused by him."

A cursory perusal of the statutes before the court in *Scotvold* v. *Scotvold*, 298 N.W. 266 (S. Dak. 1941) demonstrates their intention to effect broad changes in a wife's substantive rights. The earlier legislative changes in these incidents of coverture codified in the present statute as the court points out but taken into account is contained in the following language at p. 268:

> "Then by Chapter 98 of the Session Laws of 1887, it was provided: 'That from and after the passage of this act, woman shall retain the same legal existence and legal personality after marriage as before marriage and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone; * * *.'"

In construing this forerunner as well as other statutes, the court declared:

> "Obviously this legislation deals with more than the mere right of the wife to sue and be sued in her own name. It makes sweeping changes in her substantive rights. By these changes she emerges as a legal personality with the civil rights of the ordinary person. Among those civil rights with which she is clothed by these statutes is the right to protection from bodily harm. SDC 47.0301. That a wrongful invasion of any of these civil rights gives rise to a cause of action in the wife, is the basis of the holding of this court in Mobery v. Scott, 38 S.D. 422, 161 N.W. 998, L.R.A. 1917D, 732."

On page 269:

> "Either the statute grants sweeping remedies to the wife as against her husband, or none. We think it intended to grant the wife rights and remedies as against the world."

Of significance however, is the liberal construction accorded the statutes in derogation of common law, not because of a trend or the minority *Thompson* decision, but, rather by mandate of its law. At page 268 the court declared:

> "[1] This legislation must be interpreted in the light of certain fixed principles. While the common law is in force in this jurisdiction except where changed by statute or by other expression of the sovereign will, SDC 65:0103, the rule of strict construction of statutes in derogation of common law does not obtain in this state. Our function is to effectuate the legislative purpose through liberal construction. SDC 65.0202."

Similarly, in *Lorang* v. *Hays*, 209 P.2d 733 (Idaho 1949) the court had before it statutory and state constitutional language far broader in scope than what is here presented.

The Ohio statute construed in *Damm* v. *Elyria Lodge No. 465*, 107 N.E. 2d 337 (1952) explicitly conferred upon spouses the right to sue one another in tort.

A similar provision of Kentucky law was construed in *Brown* v. *Gosser* 262 S.W. 2d 480 (1953).

The reference at p. 9 of the petition to *Koplik* v. *C. P. Trucking Corp.*, 135 A.2d 555 (N.J. 1957) is surprising in view of the extended discussion of *Immer* v. *Risko*, 46 N.J. 482, 267 A.2d 481 (1970) at pp. 16-17 of the petition. As we earlier observed (supra, pp. 8-9), the Court of Appeals correctly noted that the New Jersey diminution of the doctrine of interspousal immunity in tort applies only in the context of automobile negligence cases.

Ennis v. *Truhitte*, 306 S.W.2d 549 (Mo. 1957) also arose out of an automobile accident situation. In holding that a wife might sue the estate of her deceased husband for damages predicated upon his negligent operation of an automobile, the court merely declared that the survival statutes of that jurisdiction allowed the maintenance of the action at bar. That the doctrine of interspousal immunity was in no way disturbed was made plain in the later decision in *Brawner v. Brawner*, 327 S.W.2d 808 (Mo. 1959).

Kowaleski v. *Kowaleski*, 361 P.2d 64 (Ore. 1961) did not at all involve the question of whether one spouse may sue another in tort, but merely the issue of whether a wife might sue her husband's employer for damages occasioned as the result of the employee's negligence. The court, in allowing the maintenance of the suit, made it plain that if the action had been brought by the wife against her husband, it would have been barred by the doctrine of interspousal immunity as consistently applied by the Oregon courts.

Appendix B

Shepardization of the California case of *Self* v. *Self*, 376 P.2d 65 (1962) discloses that the courts of that state have construed the decision as merely a construction of statutory language. As was observed in *Klein* v. *Klein*, 376 P.2d 70, 73:

> "In Self v. Self, supra, Cal. app., 20 Cal. Reptr., it was held that because the reasons for the rule of interspousal immunity for torts no longer exists, *and because of certain legislative changes in recent years*, that rule should be abandoned." (Emphasis supplied).

We respectfully recommend to the Court, in connection with the case of *Cramer* v. *Cramer*, 379 P.2d 95 (Alaska 1963) the discussions of the District Court and Court of Appeals of that case reproduced at pp. 8a-10a and 16a-18a of the appendix to the petition.